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# Practice and Procedure -- Raising Affirmative Defenses by Demurrer

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of risk on creditor requesting a certain form of payment; especially so, when it is certainly not his intent to accept such medium as absolute payment but only as payment conditional upon actual payment of the check or other medium of payment. This is even more true when in most cases the trend of the law governing checks and bank collections is found to be in the direction of giving adequate protection to payees, either by continuing the drawer's liability or allowing a preference in the insolvent's assets.<sup>16</sup> It may well be said, however, that by such a request the creditor imposes the risk upon himself and is estopped to deny that drawer is discharged by compliance with the request. Where a way of payment is prescribed it must be followed,<sup>17</sup> and since this may cause the debtor to go to added trouble and expense he should not be further liable. In the present case the reason given for holding that payment was intended was the fact that defendant-manufacturer stated that every "driveaway" must be *settled for* by cashier's check before cars would be delivered, this language seeming to state more than a mere request.

In view of the uncertainty of a jury finding the creditor should stipulate in his contract that check or other requested medium of payment is taken subject to collection as is done by banks in their deposit slips<sup>18</sup> and by some insurance companies in their policies<sup>19</sup> and notification forms.

J. D. MALLONEE, JR.

### Practice and Procedure—Raising Affirmative Defenses by Demurrer.

In an action to recover damages sustained by plaintiff when he entered defendant's store as an invitee and fell down an elevator shaft at the rear entrance of defendant's building, plaintiff alleged that defendant had maintained an elevator to the right of the entrance, and that without knowledge of plaintiff moved the entrance so as to place it in front of the elevator and that plaintiff upon entering pulled open and

<sup>16</sup> N. C. CODE ANN. (Michie, 1935) §218 (c) (14) (order and preference in distribution of insolvent bank's assets: (4) certified checks and cashier's checks in the hands of a third party as a holder for value). *Old Company's Lehigh, Inc. v. Meeker et al.*, 294 U. S. 227, 55 Sup. Ct. 392, 79 L. ed. 876 (1935) (statute allowing preferred claim does not apply to National banks); (1930) 8 N. C. L. REV. 197, 198; (1933) 19 IOWA L. REV. 90 (preference given).

<sup>17</sup> *Swift v. New York*, 83 N. Y. 528, 533 (1881).

<sup>18</sup> *Quarles v. Taylor and Co.*, 195 N. C. 313, 142 S. E. 25 (1928) (stipulation read all items accepted at depositor's risk, until we have received final actual payment).

<sup>19</sup> *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. 339 (C. C. A. 4th, 1924); *Hoar v. Union Mutual Life Ins. Co.*, 118 App. Div. 416, 103 N. Y. Supp. 1059 (1907) (policy forfeited if note or check previously given was not paid).

fell into the shaft. Defendant filed an answer denying negligence and setting up plea of contributory negligence. At trial defendant demurred *ore tenus* to the complaint; the demurrer was sustained, on the ground that the complaint alleged negligence on the part of the plaintiff which barred his recovery. *Held*: since the complaint did not show upon its face patent and unquestionable contributory negligence, defendant's demurrer should be overruled.<sup>1</sup>

Prior to 1887 there was doubt in North Carolina as to whether the plaintiff had to negative contributory negligence to state a cause of action or whether contributory negligence was an affirmative defense. This doubt as to who had the burden of pleading was settled by C. S. §523, which provided that "in all actions to recover damages by reason of negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." Nevertheless, the instant case allows the defense to be raised by demurrer. To what extent is and has this been true of other affirmative defenses? Under the common law<sup>2</sup> system of pleading a party in actions at law was precluded from availing himself of the Statute of Limitations, by demurrer, as a bar to the plaintiff's demand even when it was patent upon the face of the complaint that the limitation prescribed by the statute had expired. The reason upon which this conclusion was based was that to permit the question to be so raised would deny the plaintiff an opportunity to show some exceptions which might prevent the bar from operating.<sup>3</sup> It may be answered that the plaintiff might be allowed to amend his complaint to show such exception. The practice in the English Chancery Court was not so well established. The early cases permitted the statute to be raised by demurrer to the bill.<sup>4</sup> Yet, at one time, the common law rule against the use of the demurrer to raise the point threatened to prevail in the Chancery Court.<sup>5</sup> The

<sup>1</sup> *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536 (1936).

<sup>2</sup> *Thursly v. Warren*, Cro. Car. 159 (K. B. 1630); *Hawkings v. Billhead*, Cro. Car. 404 (K. B. 1636); *Gould v. Johnson*, 2 Ld. Raym. 838 (K. B. 1702); BLISS, CODE PLEADING (3rd ed., 1894) §205.

<sup>3</sup> *Frankersley v. Robinson*, Cro. Car. 163 (K. B. 1631); *Stile v. Finch*, Cro. Car. 381 (K. B. 1635); *Hawkings v. Billhead*, Cro. Car. 404 (K. B. 1636); *Guntton v. Hughes*, 181 Ill. 132, 54 N. E. 895 (1899); *Leshner v. U. S. Fidelity Guaranty Co.*, 239 Ill. 502, 88 N. E. 208 (1909); *Charters v. Citizens Nat'l Bank*, 84 Ind. App. 15, 145 N. E. 517 (1925); *Callan v. Bodine*, 81 N. J. L. 240, 79 Atl. 1057 (1911); *Murdock v. Herndon's Ex'r.*, 4 Hen. and M. 200 (Va., 1809); *Screck v. Virginia Hot Springs Co.*, 140 Va. 429, 125 S. E. 316 (1924); *Vencill v. Flynn*, 94 W. Va. 396, 119 S. E. 164 (1923). *Contra*: *Kirkpatrick v. Monroe*, 234 Ill. App. 213 (1924), criticized in (1925) 20 ILL. L. REV. 391.

<sup>4</sup> *Saunders v. Hord*, 1 Chan. Rep. 184 (1660); see *Pearson v. Pulley*, 1 Chan. Cases 102 (1668).

<sup>5</sup> *Aggas v. Pickerell*, 3 Atk. 225 (Ch. 1745); *Gregor v. Malesworth*, 2 Ves. Sr. 109 (Ch. 1750); *Dildraine v. Browne*, 3 Bro. C. C. 633 (Ch. 1792); see *Prince v. Heylin*, 1 Atk. 493 (Ch. 1737). These cases held that a demurrer would not be permitted to raise the point as the complainant would be prevented from re-

later cases in equity, however, in absence of the complainant's showing that the case was within one of the exceptions, sanctioned the use of the demurrer if the statute had apparently run,<sup>6</sup> and it was these cases that afforded the common statements of text writers that the equity rule allowed the point to be raised by demurrer.<sup>7</sup> This was probably the general rule in the United States,<sup>8</sup> although there was some authority to the contrary.<sup>9</sup> Under the present code system, many diverse rules have evolved. A majority of the courts hold that if the complaint on its face shows that the action is barred, then it is demurrable;<sup>10</sup> but there is some authority to the effect that the defense cannot be so raised in any instance, but it must be set up by answer.<sup>11</sup> North Carolina ad-

plying or amending his bill to show that the case came within an exception to the statute.

<sup>6</sup> *Muttoo v. Smith*, 3 Anst. 709 (Ex. Ch. 1796); *Foster v. Hodgson*, 19 Ves. Jr. 180 (Ch. 1812); *Hoore v. Peck*, 6 Sim. 51 (Ch. 1833); *Smith v. Fox*, 6 Hare 386 (Ch. 1848); see *Honenden v. Annesley*, 2 Sch. and Lef. 607, 637 (Ch. 1806).

<sup>7</sup> STORY, EQUITY PLEADING (8th ed. 1870) §§751-756; LANGDELL, SUMMARY OF EQUITY PLEADING (1883) §110; HEARD, EQUITY PLEADING (1889) 88, 89; SHIPMAN, EQUITY PLEADING (1897) 465; PHILLIPS, CODE PLEADING, §295; LUBE, EQUITY PLEADING (1840) 43.

<sup>8</sup> *Wisner v. Ogden*, Fed. Cas. No. 17,914 (C. C. D. C. 1827); *Erickson v. Insurance Co.*, 66 Fla. 154, 63 So. 716 (1913); *Henry County v. Winnebago Drainage Co.*, 52 Ill. 456 (1869); *City of Fulton v. Northern Ill. College*, 158 Ill. 333, 42 N. E. 138 (1895); *Gephart v. Sprigg*, 124 Md. 11, 91 Atl. 792 (1914); *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741 (1888); *McLean v. Barton*, Harr. Ch. 279 (Mich. 1841); *Champan v. Chene*, 1 Mich. 400 (1850); *Humbert v. Trinity Church*, 7 Paige 195 (N. Y. Ch. 1838); *Crawford Adm'rs v. Turner's Adm'rs*, 67 W. Va. 564, 68 S. E. 179 (1910).

<sup>9</sup> *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277 (1900); see *Vyse v. Richards*, 208 Mich. 383, 175 N. W. 392 (1919); LANGDELL, SUMMARY OF EQUITY PLEADING (1883) §109.

<sup>10</sup> *Ready v. Ozan Inv. Co.*, 190 Ark. 506, 79 S. W. (2d) 433 (1935) (Statute of Limitations demurrable where bar shown on face); *Hyder v. Shamy*, 40 P. (2d) 974 (Ariz. 1935) (demurrable by statute where complaint shows a bar); *Chandler v. Runnels*, 138 Kan. 673, 27 P. (2d) 232 (1933) (not demurrable where petition does not disclose on its face that action is barred); *Ferrier v. McCabe*, 129 Minn. 342, 152 N. W. 734 (1915) (where complaint shows bar); *Ludwig v. Scott*, 65 S. W. (2d) 1034 (Mo. 1933) (action in equity to cancel deeds and notes for fraud. Held: Statute of limitations in equity or at law can only be raised by pleading, not demurrer, unless bar shown on its face); *Liberty National Bank of Weatherford v. Broome*, 172 Okla. 244, 45 P. (2d) 85 (1935) (in actions for recovery of money, statute cannot be raised by demurrer where petition does not on its face show cause of action is barred); *Johnston v. State*, 49 P. (2d) 141 (Okla. 1935); *Howell v. Howell*, 15 Wis. 55 (1862); *Eiche v. Wallrabenstein*, 215 Wis. 311, 254 N. W. 534 (1934). For an elaborate discussion of the statute of limitations see the article of Professor T. E. Atkinson, *Pleading the Statute of Limitations* (1926) 36 YALE L. J. 914. See also for further information (1925) 35 YALE L. J. 487, and (1927) 27 COL. L. REV. 157.

<sup>11</sup> *Sibley Grading and Teaming Co. v. Cray*, 49 P. (2d) 823 (Cal. 1935) (not available on general demurrer); *Cage v. Young*, 95 Colo. 130, 33 P. (2d) 389 (1934) (general demurrer will not raise the statute); *Lyttle v. Johnson*, 213 Ky. 274, 280 S. W. 1102 (1926); *Vance v. Atherton*, 252 Ky. 591, 67 S. W. (2d) 968 (1934) (statute cannot be raised by demurrer, but must be pleaded); *Leffek v. Luedeman*, 95 Mont. 457, 27 P. (2d) 511 (1933) (Statute of Limitations can only be raised by answer regardless of bar shown on face of complaint); *Robinson v. Lewis*, 45 N. C. 58 (1852); *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204 (1890)

heres to the latter view. Some courts permit the demurrer only in equity cases, but not in actions at law.<sup>12</sup> A further variation of the authorities is found in those cases allowing the right to demur if no exception can be applicable<sup>13</sup> but disallowing the demurrer if an exception might be applicable.<sup>14</sup> Some states provide by statute that a demurrer may be interposed.<sup>15</sup> A distinction has been drawn between the general Statute of Limitations and time limitations applicable to special statutory actions, in which case compliance with the statute must be pleaded by the plaintiff else his complaint is demurrable, and presumably if the complaint on its face shows a bar it is also demurrable. The better rule, it is suggested, is to permit the demurrer to raise the issue so as to dispose of the case finally because of the bar of the statute. To overrule the defendant's demurrer and require him to plead the statute in his answer, merely protracts litigation, as the defendant will then ask for a judgment on the pleadings.

In regard to the Statute of Frauds, in England, in actions of equity<sup>16</sup> the plaintiff had the burden of allegation; however, in actions at law<sup>17</sup> the defendant had the burden of allegation. This distinction was abolished by the Judicature Acts, which placed the burden of allegation

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(Statute of Limitations not raised by demurrer even when complaint shows bar, either in equity or at law. Statute must be pleaded in both instances); *Logan v. Griffith*, 205 N. C. 580, 172 N. E. 348 (1934) (limitation on tax foreclosure sale not demurrable though bar is apparent on face). Otherwise before the Code, *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. ed. 774 (1914); *King v. Powell*, 127 N. C. 10, 37 S. E. 62 (1900) (Statute of Limitations cannot be set up by demurrer but must be specifically pleaded in the answer).

<sup>12</sup> *Green v. Proctor and Gamble Distributing Co.*, 92 Fla. 396, 109 So. 471 (1926) (Statute of Limitations in an action at law is not demurrable though bar is shown on its face); *Henry County v. Winnebago Drainage Co.*, 52 Ill. 456 (1869); *Quinn v. Quinn*, 260 Mass. 494, 157 N. E. 641 (1927) (must be set up in answer in action at law); *Aisenberg v. Royal Ins. Co., Ltd.*, 266 Mass. 543, 165 N. E. 682 (1929); *Gallagher v. Wheeler*, 198 N. E. 891 (Mass. 1935) (Statute of Limitations is good for demurrer in equity); *Doss v. O'Toole*, 80 W. Va. 46, 92 S. E. 134 (1917); *Cameron v. Cameron*, 111 W. Va. 375, 162 S. E. 173 (1931) (defense that cause of action is barred by limitation is available on demurrer in law cases).

<sup>13</sup> *Leard v. Leard*, 30 Ind. 171 (1868); *Hanna v. Jeffersonville Ry.*, 32 Ind. 113 (1869); *Law v. Ramsey*, 135 Ky. 333, 122 S. W. 167 (1909); *Missouri, K. and T. Ry. v. Wilcox*, 32 Okla. 51, 121 Pac. 656 (1912).

<sup>14</sup> 128 Ind. 110, 26 N. E. 794 (1891); *Brashears' Heirs v. Brashears*, 144 Ky. 451, 139 S. W. 738 (1911); *Groziani v. Ernst*, 169 Ky. 751, 185 S. W. 99 (1916); *Klinekline v. Head*, 205 Ky. 644, 266 S. W. 370 (1924); *Polson v. Revard*, 104 Okla. 279, 232 Pac. 435 (1924).

<sup>15</sup> ARIZ. REV. STAT. (1913) §468; IOWA CODE (1924) §11141; OHIO GEN. CODE (Page, 1920) §11309; ORE. LAWS (Olsen, 1920) §68; WASH. COMP. STAT. (Remington, 1922) §259; WIS. STAT. (1921) §2649.

<sup>16</sup> *Wood v. Midgley*, 5 De. G. M. & G. 41 (Ch. 1854).

<sup>17</sup> Anonymous, 2 Salk. 519 (Eng. 1708); *Pascal v. Richards*, 50 Law J. Ch. Div. 337 (1881); *Price v. Weaver*, 13 Gray 273 (Mass. 1859); *Mullaly v. Holden*, 123 Mass. 583 (1878); *Walker v. Richards*, 39 N. H. 259 (1859); STEPHEN, PLEADING (9th Am. ed. 1867); BLISS, CODE PLEADING (1894) §354.

upon the defendant in all instances.<sup>18</sup> A few American jurisdictions still give the burden of allegation to the plaintiff;<sup>19</sup> however, a majority of the courts<sup>20</sup> make the Statute of Frauds an affirmative defense, but allow the defendant to raise it by demurrer. A few courts<sup>21</sup> follow the old English practice. North Carolina is *contra* to the majority view.<sup>22</sup> It is submitted that the same reason given above for permitting the Statute of Limitations to be raised by demurrer is applicable to the Statute of Frauds.

As to the defense of payment, the rule of *Hilary Term 4 W. 4* specifically stipulated that payment was to be specially pleaded,<sup>23</sup> but under this rule it was held that payment which did not amount to a complete discharge, but operated merely in reduction of damages, need not be pleaded specially, in assumpsit,<sup>24</sup> although it was otherwise in debt.<sup>25</sup> But a later rule was promulgated ordering that payment should not in any case be allowed to be given in evidence in reduction of damages or debt, but that it should be pleaded in bar,<sup>26</sup> which seems to have been the early rule in this country.<sup>27</sup> Under our present systems of pleading, a majority of the courts hold that payment is an affirmative defense which the defendant must plead and prove.<sup>28</sup> There are two

<sup>18</sup> *Fuctcher v. Fuctcher*, 50 L. J. Ch. Div. (N. S.) 735 (1881) (this case clearly states the practice before and after the Judicature Acts); *Morgan v. Worthington*, 38 L. T. Ch. Div. (N. S.) 443 (1878).

<sup>19</sup> *McCoy v. McCoy*, 32 Ind. App. 38, 69 N. E. 193 (1903); *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900 (1913); *Candill v. Gorman Coal Co.*, 242 Ky. 294, 46 S. W. (2d) 93 (1932).

<sup>20</sup> *Randall v. Howard*, 67 U. S. 585, 17 L. ed. 269 (1862); *Norton v. Slegmeyer*, 175 Fed. 756 (C. C. A. 8th, 1910); *Rabe v. Danaker*, 56 F. (2d) 758 (C. C. A. 2nd, 1932); *Thompson v. N. S. Coal Co.*, 135 Ala. 630, 34 So. 31 (1903); *Pasten v. Cleve*, 201 Ala. 529, 78 So. 883 (1918); *Dickey v. McKinlay*, 163 Ill. 318, 45 N. E. 134 (1896); *Koenig v. Dohm*, 209 Ill. 468, 70 N. E. 1061 (1904); *Ropachi v. Ropachi*, 354 Ill. 502, 188 N. E. 401 (1933); *Ahrend v. Ordiorne*, 118 Mass. 261 (1875); *Denvir v. North Avenue Savings Bank*, 194 N. E. 836 (Mass. 1935); *Seamens v. Barentsen*, 180 N. Y. 333, 73 N. E. 42 (1905); *Collins v. Philadelphia Oil Co.*, 97 W. Va. 464, 125 S. E. 223 (1924).

<sup>21</sup> *McDonald v. McDonald*, 215 Ala. 179, 110 So. 291 (1926); *Firemen's Fund Ins. Co. v. Williams*, 170 Miss. 199, 154 So. 545 (1934).

<sup>22</sup> *Ingram v. Corbit*, 177 N. C. 318, 99 S. E. 18 (1919); *Pilot Real Estate Co. v. Fowler*, 191 N. C. 616, 132 S. E. 575 (1926), cited and followed in *Ollis v. Ricker*, 203 N. C. 671, 166 S. E. 801 (1932).

<sup>23</sup> *Hil. T. 4 W. 4* (1833).

<sup>24</sup> *Shirley v. Jacobs*, 2 Bing. N. C. 88 (C. P. 1835).

<sup>25</sup> *Belbin v. Butt*, 2 M. and W. 422 (Ex. 1837).

<sup>26</sup> *T. T. I. Vict.*

<sup>27</sup> Unless the proceedings contained an averment of payment, the presumption of payment could not be raised. *Fellers v. Lee*, 2 Barb. 488 (N. Y. 1848); *Martin v. Gage*, 9 N. Y. 398 (1853); *Martin v. Pugh*, 23 Wis. 184 (1868).

<sup>28</sup> *Rawleigh Co. v. Snider*, 194 N. E. 356 (Ind. 1935) (statute makes payment an affirmative defense); *Manglares v. Passiales*, 244 Mich. 188, 221 N. W. 149 (1928) (by rule of circuit court); *Smith v. Smith*, 262 Mich. 60, 247 N. W. 106 (1933); *Dickensheets v. Patrick*, 217 Mo. App. 171, 274 S. W. 89 (1925); *Omaha Alfalfa Milling Co. v. Hallen*, 105 Neb. 193, 179 N. W. 1010 (1920); *McKyring v. Bull*, 16 N. Y. 297 (1857); *Bernham Corp. v. Ship Ahoy*, 200 App. Div. 399, 193 N. Y. S. 372 (1922); *Ellison v. Ricks*, 85 N. C. 77 (1881); *Reserve Loan*

reasons given in support of this view. First, it avoids surprise on the plaintiff and apprises him of the exact issue to be proved by the defendant.<sup>29</sup> Second, the defendant can more easily show affirmatively a payment, if any, than the plaintiff can prove a general negative.<sup>30</sup> The only case found in North Carolina is in accord with the majority view.<sup>31</sup> But even though the plaintiff need not prove non-payment, it is still thought that he must allege it to state a cause of action. Thus, if the complaint shows payment, the plaintiff is alleging just the opposite of the averment necessary for stating a cause of action. Logically, therefore, a demurrer to such a complaint should be sustained. No cases directly presenting the question have been found. One dictum<sup>32</sup> is explicitly *contra*, and one holding<sup>33</sup> leaves the implication of a contrary result.

No common law cases were found in which the issue of contributory negligence was presented upon demurrer. Whatever may have been the situation at common law, the present English rule<sup>34</sup> and that of a majority of American jurisdictions,<sup>35</sup> generally speaking, support the conclusion that contributory negligence is an affirmative defense to be

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*Life Ins. Co. v. Simmons*, 140 Okla. 212, 282 Pac. 279 (1928); *Washington v. Mechanics and Traders Ins. Co.*, 50 P. (2d) 621 (Okla. 1935); *Palmer v. Parker*, 91 Wash. 683, 158 Pac. 1017 (1916); *Gardner v. Avery Mfg. Co.*, 117 Wis. 487, 94 N. W. 292 (1903). See also CLARK, CODE PLEADING (1928) 422; SOUTHERLAND, CODE PLEADING (1910) §529; Reppy, *The Anomaly of Payment As An Affirmative Defense* (1924) 10 CORN. L. Q. 269; Alden, *The Defense of Payment Under the Code System* (1909) 19 YALE L. J. 647.

<sup>29</sup> See Note (1932) 31 MICH. L. REV. 132.

<sup>30</sup> CLARK, CODE PLEADING (1928) 422.

<sup>31</sup> *Ellison v. Ricks*, 85 N. C. 77 (1881).

<sup>32</sup> In *Dean v. Boyd*, 86 Miss. 204, 38 So. 297 (1905) the court, on demurrer to the bill, stated categorically that "payment should be set up by plea or answer, not by demurrer."

<sup>33</sup> *Confield v. Tobias*, 21 Calif. 349 (1863) (Plaintiff brought action for goods sold, and, anticipating the defense of payment based upon notes given by the defendant, alleged fraud on the defendant's part to avoid the effect of payment. Defendant's answer alleged payment by notes referred to in complaint but did not deny allegations concerning fraud. The case was submitted on the pleadings and plaintiff had judgment. *Held*, allegations of complaint in reference to transaction claimed to operate as payment were not material allegations requiring a denial, and were not therefore admitted by failure of defendant to deny them).

<sup>34</sup> *Wakelin v. London and Southwestern Ry. Co.*, L. R. 12 A. C. 41, 51 (1886); SALMOND, LAW OF TORTS (6th ed. 1913) §9; BURDICK, LAW OF TORTS (4th ed. 1926) §65. For support of opposite doctrine see CLERK AND LINDSELL, TORTS (7th ed. 1921) 510 n (e).

<sup>35</sup> *Olson v. City of Butte*, 86 Mont. 24, 283 Pac. 222 (1929) (must be pleaded as a defense unless plaintiff's evidence shows his own negligence); *Smith v. Odd Fellows Building Assoc.*, 46 Nev. 48, 205 Pac. 796 (1922); *Duffy v. Atlantic and N. C. R. Co.*, 144 N. C. 26, 56 S. E. 557 (1907) (must be pleaded by defendant unless facts stated in complaint which as a matter of law show contributory negligence); *Rosenthal v. Reed*, 129 Ore. 203, 276 Pac. 684 (1929) (not available as a defense where not pleaded); *Missouri P. R. Co. v. Watson*, 72 Tex. 631, 10 S. W. 731 (1889); SPEARMAN AND REDFIELD, NEGLIGENCE (1913) §109; BURDICK, LAW OF TORTS (1926) §65 (455); HARPER, LAW OF TORTS (1933) §135. See also (1920) 6 IOWA L. BULL. 55; (1931) 44 HARV. L. REV. 292.

specially pleaded and proved by the defendant. There is an exception to the above general rule which seems to be substantiated by a majority of the courts; that is, if contributory negligence is patent upon the face of the complaint, it need not be specially pleaded; instead, a demurrer will suffice to present the issue.<sup>36</sup> The instant case allows the defendant to take advantage of such a defense by way of demurrer and is thus in accord with the majority view. The court, in allowing the issue to be raised, by demurrer, relied upon *Burgin v. Richmond and Danville R. R. Co.*,<sup>37</sup> but the case of *Smith v. Southern Ry. Co.*<sup>38</sup> reached the directly opposite result upon an identical set of facts. Unfortunately, however, the later case did not specifically overrule the *Flemington* case, as no authority was cited for the position taken by the court. A strict interpretation of statute,<sup>39</sup> making this an affirmative defense, would preclude the result of the principal case. The same conclusion could be supported by the argument that to permit the issue to be raised by demurrer fosters the use of a defense of which the plaintiff is not informed. However, if the plaintiff's contributory negligence operates as a complete bar to recovery as a failure to state a cause of action, then indisputably the use of the demurrer should be sanctioned. In corroboration of this position, it might be further said that if the pleader, who undoubtedly is in a better position to state his cause of action, can do no more than state facts in a complaint, which on its face shows that there is no cause of action, then the demurrer should be allowed.

STATON P. WILLIAMS.

<sup>36</sup> *Adams v. Mayor of City of Waycross*, 114 Ga. 712, 40 S. E. 699 (1902); *Dorsey v. Columbus Ry. Co.*, 121 Ga. 697, 49 S. E. 698 (1905); *Hendrix v. Jones*, 28 Ga. App. 335, 111 S. E. 81 (1922); *Wynne v. So. Bell Tel. and Tel. Co.*, 129 Ga. 623, 126 S. E. 388 (1925); *Tybee Amusement Co. v. Odum*, 51 Ga. App. 1, 179 S. E. 415 (1933); *Mason v. Frankel*, 49 Ga. App. 145, 174 S. E. 546 (1935); *Smith v. Oregon Short Line Ry. Co.*, 47 Idaho 604, 277 Pac. 570 (1929); *Pipher v. Carpenter*, 7 P. (2d) 589 (Idaho 1932); *Favre v. Louisville and N. Ry. Co.*, 91 Ky. 541, 16 S. W. 370 (1891); *Stillwell v. South Louisville Land Co.*, 22 Ky. 785, 58 S. W. 696 (1900); *Clark v. Chicago, Milwaukee and St. Paul Ry. Co.*, 28 Minn. 69, 9 N. W. 75 (1881); *Eaton v. Wallace*, 287 S. W. 614 (Mo. 1926); *Frye v. Omaha and Council Bluffs Street Ry. Co.*, 106 Neb. 333, 183 N. W. 567 (1921); *Morgan v. Hudson River Telephone Co.*, 50 Misc. Rep. 388, 100 N. Y. Supp. 539 (1906); *Duffy v. A. and N. C. R. R. Co.*, 144 N. C. 26, 56 S. E. 557 (1907) ("Defense of contributory negligence must be set up in answer as we find no facts stated in the complaint which as a matter of law constitute contributory negligence."); *Smith v. Southern Ry. Co.*, 80 S. C. 1, 61 S. E. 205 (1908); *City of Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37 (1901); *Baker v. Butterworth*, 119 Va. 402, 89 S. E. 849 (1916).

<sup>37</sup> 115 N. C. 673, 20 S. E. 473 (1894) (plaintiff's pleadings showed that he stepped from a moving train. *Held*, demurrer properly sustained).

<sup>38</sup> 129 N. C. 374, 40 S. E. 86 (1901) (plaintiff's pleadings showed he stepped from a moving train. *Held*, contributory negligence is a defense to be pleaded by way of answer).

<sup>39</sup> N. C. CODE ANN. (Michie, 1935) §523.